## KPS-HCM SDN BHD v. SHAHRUL IZEWAN MAT HUSIN & ORS

HIGH COURT MALAYA, SHAH ALAM
ZALITA ZAIDAN JC
[CIVIL APPEAL NO: BA-12B-167-09-2016]
22 JANUARY 2018

***LOCAL GOVERNMENT:*** *Maintenance and repair – Negligence – Tree branch fell and injuring road user – Whether local authority negligent – Road reserve bordering road – Whether State road – Duty to maintain trees along State road – Whether within purview of local authority – Whether local authority statutorily bound to ensure safety of road users – Whether negligent in failing to carry out regular inspection – Local Government Act 1976, s. 101 – National Land Code, ss. 42(b) & 62(1)*

***TORT:*** *Negligence – Maintenance of tree – Tree branch fell and injuring road user – Whether local authority negligent – Road reserve bordering road – Whether State road – Duty to maintain trees along State road – Whether within purview of local authority – Whether local authority statutorily bound to ensure safety of road users – Whether negligent in failing to carry out regular inspection – Local Government Act 1976, s. 101 – National Land Code, ss. 42(b) & 62(1)*

The plaintiff, Shahrul Izewan, claimed that on 6 October 2010, while riding his motorcycle from Batu Caves towards the Gombak Police Station Headquarters, Selayang and upon reaching Jalan Simpang 3, Jalan Bukit Idaman/Jalan 6 Bukit Idaman, a tree fell and one of its branch hit the plaintiff and his motorcycle, causing the plaintiff to suffer injury, damages and losses. The plaintiff commenced a suit claiming that the tree branch was from the tree belonging to the first defendant, Majlis Perbandaran Selayang, and/or maintained by the second defendant, KPS-HCM Sdn Bhd, and pleaded that the first and second defendants contributed negligently to the cause of the accident. The first defendant included the Public Works Department ('JKR') as a third party to the proceedings, contending that the third party was the owner of the road reserve bordering the said road and, as the road maintenance works had been contracted to the second defendant, the responsibility was placed on the second defendant. The Sessions Judge allowed the plaintiff's claim with costs, holding that the second defendant was 100% liable towards the plaintiff without finding any liability against the first defendant and/or the third party. Hence, this appeal by the second defendant against the decision on liability against the plaintiff, the first defendant and the third party, respectively, as the first, second and third respondents. The second defendant's several grounds of appeal were pertaining to the responsibility of the first defendant and the nexus between the second defendant and the third party based on the contract. The crux of the matter in this appeal, *inter alia*, was pertaining to the road reserve bordering the road.

**Held (allowing appeal with costs):**

**(1)** Land has been categorised as a State matter in the Federal Constitution. Section 40(a) of the National Land Code ('NLC') provides that the entire property in all state land vested solely in the State Authority. Under s. 42(b) of the NLC, the State Authority shall have the power to reserve State land and s. 62(1) of the NLC provides that the State Authority has the power to reserve any State land for any public purpose and by notification in the Gazette, reserve any State land. In the instant case, there was no proof adduced by the first defendant that the road reserve was owned by JKR. Hence, the road reserve bordering the State road was not a private land and, since it was not gazetted, it could not be categorised as a reserve land. It belonged to the State Authority and was a State land. (paras 49, 55 & 58)

**(2)** The contract was between the State Government of Selangor and the second defendant, wherein the road maintenance works as defined is as listed in the Schedules to the contract. Cutting trees was categorised as Emergency Works defined under the Appendix III of the contract. However, the word 'trees' was not used in the contract but rather 'vegetation' to differentiate the maintenance works involving vegetation and trees under the contract. If the second defendant was tasked to clear the trees along the State road, it would have been clearly provided in the contract. The *contra proferentum* rule was not applicable as the word 'trees' was not expressly stated in the contract and there was no clause in the contract which had two or more meanings regarding the word 'vegetation'. (paras 59 & 62-64)

**(3)** The duty to maintain trees by or along the State road is to be borne by the local authority as provided under s. 101 of the Local Government Act 1976 ('LGA'). The first defendant admitted that the maintenance of the landscape which included the trees along the State road fell under the purview of the first defendant which was statutorily provided in the LGA. Hence, the first defendant was responsible on the road reserve. This was further corroborated by the letter from JKR to all States for Federal roads where the maintenance works were carried out as projects between the States and local authorities must be in accordance to what JKR had meted out. In this case, it involved a State road where JKR did not have the jurisdiction to interfere. (paras 63, 65 & 66)

**(4)** Section 101 of the LGA clearly imposes a duty on the first defendant to remove or trim any tree, shrub or hedge which in its opinion is likely to endanger public safety or convenience. The keyword is 'likely to endanger' which means that before the tree becomes a danger to the public, the local authority should prevent any unwanted catastrophe. In addition, s. 101(b) of the LGA refers to trees as one of the duties of the local authorities. Any act done or omission by the first defendant would give direct repercussion on the plaintiff. The first defendant is statutorily

bound to ensure that the safety of the plaintiff and any road users of Jalan Bidara are not compromised by any tree on or along the State road. The subjected tree would not go unnoticed if regular inspection and patrol were carried out by the first defendant. In the circumstances, the first defendant was wholly liable. (paras 73 & 74)

**Case(s) referred to:**

*Ahmad Jaafar Abdul Latiff v. Dato' Bandar Kuala Lumpur [2014] 9 CLJ 861 FC* ***(refd)***
*Anns v. Merton London Borough Council [1978] AC 728* ***(refd)***
*Batang Kali Estates Sdn Bhd v. Romani Abdul Aziz [1995] 3 CLJ 836 HC* ***(refd)***
*Cushing v. Walker [1941] 2 All ER 693* ***(refd)***
*Ganad Media Sdn Bhd v. Metrawiac Corporation Sdn Bhd & Anor; Pentadbir Tanah Daerah Petaling (Third Party) [2010] 1 LNS 1254 HC* ***(refd)***
*Hay Me Kian & Anor v. Dewan Bandaraya Kuching Utara [2008] 2 CLJ 724 HC* ***(refd)***
*Hoon Wee Thim v. Pacific Tin Consolidated Corporation [1966] 1 LNS 69 HC* ***(refd)***
*Hotel Sentral (JB) Sdn Bhd v. Pengarah Tanah Dan Galian Negeri Johor, Malaysia & Ors [2016] 3 CLJ 931 HC* ***(refd)***
*Kandasami Kaliappa Gounder v. Mohd Mustafa Seeni Mohd [1983] 2 CLJ 55; [1983] CLJ (Rep) 7 PC* ***(refd)***
*Kerajaan Malaysia v. Global Upline Sdn Bhd & Another Appeal [2016] 1 LNS 1158 CA* ***(refd)***
*Kong Ming Bank Bhd v. Leong Ho Yuen [1982] 1 LNS 23 FC* ***(refd)***
*Kyros International Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2013] 3 CLJ 813 CA* ***(refd)***
*Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd [2017] 5 CLJ 418 FC* ***(refd)***
*Majlis Daerah Mersing v. Tenaga Nasional Bhd [2008] 1 LNS 321 HC* ***(refd)***
*Ng Chul Sia v. Maimon Ali [1982] 1 LNS 95 HC* ***(foll)***
*Shalimar Malay PLC v. Majlis Daerah Kuala Selangor [2015] 10 CLJ 766 HC* ***(refd)***
*Tan Kuan Yau v. Suhindrimani Angasamy [1985] 1 CLJ 429; [1985] CLJ (Rep) 323 FC* ***(refd)***
*Tan Sri Khoo Teck Puat & Anor v. Planitude Holdings Sdn Bhd [1993] 2 CLJ 146 SC* ***(foll)***

**Legislation referred to:**

Federal Capital Act 1960, s. 4
Federal Constitution, art. 83(1), (7)
Government Proceedings Act 1956, s. 7(1), (2)
Local Government Act 1976, ss. 2, 63, 101(b), (cc)
National Land Code, ss. 5, 40(a), 42(b), 43, 62(1)
Road Transport Act 1987, s. 2
Rules of Court 2012, O. 16 rr. 1(1), 3(3)(a), (b)

*For the appellant/2nd defendant - Kalearasu K Veloo; M/s SF Chan & Co*
*For the 1st respondent/plaintiff - Mohd Saufi Samsudin; M/s G Dorai & Co*
*For the 2nd respondent/1st defendant - Mohamed Fadly Zakariya; M/s Zuraidah Naziha & Fadly*
*For the 3rd respondent/3rd party - Mohd Haziq Arif, State Legal Advisor, Selangor*

*[Editor's note: Appeal from Sessions Court, Selayang; Summons No: A53KJ-151-09-2013 (overruled).]*

*Reported by S Barathi*

## JUDGMENT

**Zalita Zaidan JC:**

**Introduction**

**[1]** This is an appeal by the appellant (second defendant) against liability decided by the Session Judge of the Selayang Sessions Court on 29 August 2016 after a full trial involving a tort action. The first respondent in this appeal is the plaintiff who brought the suit against the appellant and the second respondent, Majlis Perbandaran Selayang (first defendant).

**[2]** The first defendant included Jabatan Kerja Raya (JKR) as a third party to the proceedings. In this appeal, JKR is the third respondent.

**[3]** This appeal was heard on 12 April 2017 and I gave my decision with preliminary grounds orally on 12 April 2017. I allowed the appeal substituting the first defendant as wholly liable with costs. The parties will be known as they were in the Sessions Court and my full grounds now follow.

**Background**

**[4]** The plaintiff claimed that on 6 October 2010, at 21hrs (9pm), the plaintiff was riding his motorcycle bearing registration number WSR 4865 from Batu Caves towards the Gombak Police Station Headquarters, Selayang and upon reaching Jalan Simpang 3, Jalan Bukit Idaman/Jalan 6 Bukit Idaman, a tree fell and one of the tree branch hit the plaintiff and his motorcycle which caused the plaintiff to suffer injury, damages and losses. The plaintiff claimed that the tree branch was from the tree belonging to the first defendant and/or maintained by the second defendant.

**[5]** The plaintiff claimed that the accident was wholly caused or contributed negligently by the first defendant and/or the second defendant and/or their agents or workers for failure to ensure plaintiff's safety while plaintiff was riding at the scene and/or allowing the tree to fell on the plaintiff.

**[6]** The plaintiff's amended statement of claim (para. 3, p. 17 of appeal record lampiran 2) stated that the second defendant is the party responsible for road maintenance and/or trees based on its scope of road maintenance works at the shoulders of Jalan Simpang 3, Jalan Bukit Idaman/Jalan 6 Bukit Idaman, Selangor Darul Ehsan.

**[7]** The plaintiff claimed that the first defendant, having the ownership of Jalan Idaman Bukit, Selayang including the trees along the said road, is responsible to care for the trees.

**[8]** It was claimed by the plaintiff that the first defendant and the second defendant at all material times have the control or responsibility to maintain the trees along Jalan Bukit Idaman, Selayang, Selangor Darul Ehsan.

**[9]** The second defendant denied that it is responsible for the maintenance of the trees where trees posing as a danger to the public is under the emergency works category which is the responsibility of the first defendant.

**[10]** The Sessions Judge allowed the plaintiff's claim with cost by deciding that the second defendant is 100% liable towards the plaintiff without fixing any liability towards the first defendant and/or third party. On quantum, the Sessions Judge decided RM126,500 for general damages and RM3,640 as special damages.

**The Second Defendant's Case (The Appellant)**

**[11]** Learned counsel for the second defendant advanced 29 grounds based on its amended memorandum of appeal (pp. 23-29 of supplementary appeal record, 7 December 2016 and pp. 1-5 of memorandum of appeal of 29 September 2016, appeal record lampiran 2). It is submitted that the accident involving the plaintiff occurred within the jurisdiction of the first defendant. The second defendant's counsel averred that the Sessions Judge erred in deciding that the second defendant was wholly liable on the basis that the third party was liable. The second defendant's counsel asserted that its scope of works is road maintenance which does not include trees and in the latter, maintaining the trees fall under the responsibility of the first defendant.

**[12]** Counsel for the second defendant argued that the Sessions Judge also failed to consider the Federal Court case of *Ahmad Jaafar Abdul Latiff v. Dato' Bandar Kuala Lumpur* [2014] 9 CLJ 861 which placed on the local authority's obligation to enter the private road and remove the tree. Based on the principle of *stare decisis*, it was submitted by the second defendant's counsel that the Sessions Judge is bound by the Federal Court's decision of *Ahmad Jaafar Abdul Latiff (supra).*

**[13]** The second defendant's counsel further argued that following s. 63 of the Local Government Act 1976 (LGA 1976), it provides that the local authority's general control and care of all places within the local authority area. Counsel further averred that s. 101 of LGA 1976 clearly imposes a statutory duty on the local authority. It was further averred that the levy, referred to as 'cukai taksiran' collected by the first defendant goes towards the upkeep of the landscape. Counsel for the second defendant submitted that the plaintiff failed to prove that the maintenance work of the trees is by JKR and that the second defendant is involved only on rectification works of the road.

**First Defendant's Case**

**[14]** Learned counsel for the first defendant introduced to this court a brief background to the suit brought by the plaintiff which was against the first defendant and the second defendant. It was explained before the court that the first defendant took JKR as a third party, initially it was JKR Daerah Gombak, the Federal JKR and the Government of Malaysia and the Sessions

Court allowed the striking out applications by the Federal JKR and the Government of Malaysia, leaving JKR Daerah Gombak as the third party in this case.

**[15]** Counsel for the first defendant raised the issue as to whether the first defendant, a local authority is liable to maintain the trees located at the road reserve and averred that the second defendant is responsible to maintain the trees as the road reserve is a private place. Relying on the Federal Court case of *Ahmad Jaafar Abdul Latif (supra),* counsel submitted that the said Federal Court case had clarified that the tree located at a public place as defined under s. 2 of Local Government Act 1976, which in that case was under the Federal Land Commissioner, can be entered by the local authority when there is a public danger. Counsel further averred that the first defendant is to maintain any plants within its jurisdiction that is the public place following s. 101(b) and (cc) of the Local Government Act 1976, however, as the tree was on a road reserve which is 'owned' by JKR, it should be maintained by the second defendant.

**[16]** The evidence adduced by the first defendant's counsel is JKR's letter of 17 November 2008 to local authorities where the local authorities are required to get approval of road owners in carrying out any works (pp. 308-311 appeal record lampiran 4) and that there is a long term contract entered between JKR and the second defendant (the contract) (pp. 375-429 of appeal record lampiran 4).

**[17]** Counsel for the first defendant submitted that there was no evidence by SP1, the Fire Department Officer, to show that there is evidence that the tree was in fact a danger to public safety. Counsel further submitted that the facts of the case of *Ahmad Jaafar Abdul Latif (supra)* is similar to this case where the tree by the road shoulders fell on a road user.

**[18]** It was brought to this court's attention that following the Schedule to the contract, maintenance works are described where trees would be defined within the meaning of 'vegetation'. Counsel for the first defendant submitted that in reference to the Parks Enactment 1984 (Sabah No. 6 of 1984) and the Sabah Environment Protection Enactment 2002, 'vegetation' includes "Forest" and, as such, includes trees. As it was not defined in the contract, counsel argued that the rule of *contra proferentum* should apply against the party who presented the contract to the court.

**[19]** It was averred by the first defendant's counsel that no evidence at all was produced that the tree was dead prior to the accident and in fact admitted by the plaintiff that the tree was in good condition to which counsel relied on the case of *Batang Kali Estates Sdn Bhd v. Romani Abdul Aziz* [1995] 3 CLJ 836 arguing that it has to be proven that the tree was diseased and that onus of proof is always on the plaintiff.

**[20]** On the levy argument raised by the second defendant, counsel submitted the case of *Shalimar Malay PLC v. Majlis Daerah Kuala Selangor* [2015] 10 CLJ 766 where local authority can collect levy but does not prove that the local authority is responsible for the maintenance of the road which causes the accident as decided in the High Court case of *Siow Kwee Cheong & Others v. MBPJ* (Civil Appeal No: WA-12BNCvC-34-03-2016).

**[21]** It was also averred by the first defendant's counsel claiming that the cause of the accident was an Act of God which was confirmed by the witness that on the day of the accident, it rained for almost one hour.

**Third Party's Case**

**[22]** Learned counsel for the third party started off by explaining that the first suit brought by the plaintiff was against the first defendant and second defendant and that JKR was not in the picture. It was the first defendant which included JKR as a third party and that would also mean there is no appeal on JKR's involvement based on O. 16 r. 3(3)(a) & (b) of the ROC 2012. Counsel submitted its objection to be included as a party to this appeal and that this court should only find liability based on what was pleaded by the parties to the dispute.

**[23]** Counsel however submitted several grounds for this case and averred that the road was defined as not a private road but a public place and could not be owned by the second defendant nor the third party as it belongs to the 'Kerajaan Negeri' (State Government) based on s. 43 of National Land Code (NLC). It was further argued that the third party is not listed as 'persons' under s. 43 of NLC.

**[24]** Further submissions were laid out where counsel for the third party highlighted that if the road reserve is privately owned as argued by counsel for the first defendant, there should be fencing, and thus an application to enter and an approval would be required to enter the road reserve. Counsel for the third party then showed the letter by JKR stating the projects carried out on Federal Roads (pp. 308-310 of appeal record lampiran 4) and submitted that the argument by the first defendant that the road reserve belongs to JKR could not be proven at the Sessions Court which was not disputed by the parties.

**[25]** Counsel for the third party submitted that in the area of control of public place, this is exercised by the first defendant based on the authority, *Majlis Daerah Mersing v. Tenaga Nasional Berhad* [2008] 1 LNS 321; [2008] MLJU 390.

**[26]** It was further submitted that based on the Federal Court case of *Ahmad Jaafar Abdul Latif (supra)*, the duty of care of the local authority extends beyond public road which includes private road, where at all times the local authority must be responsible and counsel referred to the case of *Hay Me Kian & Anor v. Dewan Bandaraya Kuching Utara* [2008] 2 CLJ 724 where it was decided that the local authority owes a responsibility.

**[27]** Counsel averred that no principle *'contra proferentum'* should apply as firstly it should be applied to those parties to the contract and not with those who are not parties, where the contract is between the State Government and the second defendant and secondly, both parties agreed to the terms of the contract: *Kandasami Kaliappa Gounder v. Mohd Mustafa Seeni Mohd.* [1983] 2 CLJ 55; [1983] CLJ (Rep) 7, Privy Council.

**[28]** In relation to the ground of judgment of the Sessions Judge that the second defendant is liable as JKR is liable, counsel for the third party highlighted that there was no evidence of physical works and maintenance carried out by the third party prior to the accident and averred that the immunity provided to JKR under s. 7(1) and (2) of Government Proceedings Act 1956 applies.

**Plaintiff's Case**

**[29]** Learned counsel for the plaintiff submitted that it is not disputed that the existence of the trees and the fallen tree branch and argued that the issue at hand is who is responsible for the maintenance of the trees. It was averred that the second defendant is fully responsible for the road maintenance including the trees at the scene of the accident as it had signed a contract with the third party. It was submitted that the second defendant had the opportunity to inspect the trees at the scene of accident as it had full access to maintain the trees.

**[30]** The plaintiff's counsel averred that the condition of the trees can only be verified by an arborist and not ordinary persons. In reference to the arborist report by the plaintiff's Certified Arborist of 2013 (pp. 292-293 of appeal record lampiran 4) it concluded among others that,

> 3. Tanah di tepi longkang di antara pokok no. 3 hingga pokok no. 7 didapati basah air. Tanah seperti ini tidak sesuai untuk pertumbuhan dan pembinaan sistem akar. Pokok yang tumbuh di kawasan seperti ini akan mempunyai sistem akar yang sedikit dan mudah tumbang kecuali pokok yang memang memerlukan habitat basah berair.

**[31]** It was submitted by the plaintiff's counsel that the Certified Arborist of the second defendant's was carried out in 2014, almost had similar conclusion that the trees grown along the said road are not safe. There was no evidence adduced by the first defendant and the third party to rebut that there were differences on the condition of the trees in the year of the accident 2010 until 2014.

**[32]** In relation to the issue that the fallen tree branch was an 'Act of God' due to rain, the plaintiff's counsel submitted that based on the weather report of the Meteorology Department (exh. P3(a)-(f), pp. 270-275 of appeal record lampiran 4), there was no incremental weather found and it rained as normal at 1500hrs - 1600hrs (3pm-4pm) and 1600hrs - 1700hrs (4pm-5pm), for a total of 52 minutes with 1 millimeter amount of rain and the wind was not

strong. The plaintiff's counsel relied on a number of cases that heavy shower in Malaysia is not considered as an Act of God: *Hoon Wee Thim v. Pacific Tin Consolidated Corporation* [1966] 1 LNS 69; [1966] 2 MLJ 240, HC and the case that the wind can amount to an Act of God if it is exceptionally strong that no one could be reasonably expect to anticipate it or provide against it based on the case of *Cushing v. Walker* [1941] 2 All ER 693.

**Second Defendant In Reply**

**[33]** Briefly, counsel for the second defendant submitted that there is no reason for the first defendant not to enter the road reserve when six days before the accident, the first defendant had entered the road reserve to cut down a tree based on public's complaint as testified by the first defendant's witness (SD2).

**[34]** The second defendant's counsel objected to the submission of '*contra proferentum*' stating that it was not raised at the trial and the rule cannot be used as to guarantee a responsibility which may run counter to the responsibilities provided in the contract. In relation to the maintenance and upkeep of the landscape, the second defendant's counsel submitted that the first defendant provides the guidelines on landscape works approval which includes road reserve as under item 13.2.2 'Landskap Lembut a) Pokok Utama' (p. 495 of appeal record lampiran 4).

**Decision Of The Sessions Court**

**[35]** The Sessions Judge found that the second defendant is wholly liable based on the grounds which are reproduced in parts as follows:

…

1.2 Mahkamah mendapati kawasan tempat kemalangan tersebut adalah merupakan milik rezab kepada Pihak Ketiga yang mana telah diakui oleh Pihak Ketiga dalam Pernyataan Pembelaannya

1.3 Mahkamah juga telah meneliti dan menerima eksibit D16 yang merupakan surat Piahk Ketiga bertarikh 17.12.2013 mengakui bahawa Pihak Ketiga bertanggungjawab menyelenggara rezab jalan tersebut.

2. Mahkamah mendapati pokok subjek tersebut adalah terletak di kawasan peribadi milikan Pihak Ketiga dan diselanggarakan oleh kontraktornya iaitu Defendan Kedua.

…

2.2 Mahkamah mendapati eksibit D17 adalah jelas menyatakan bahawa semua PBT perlu mendapatkan persetujuan "tuan punya" jalan sekiranya ingin melakukan sebaarng kerja-kerja yang dinyatakan dalam pekeliling tersebut.

2.3 Dalam kes ini, Mahkamah berpendapat bahawa tiada pihak lain dibenarkan untuk melakukan apa-apa kerja penyelenggaraan kecuali Defendan Kedua kerana Defendan Kedua telah dipertanggungjawabkan untuk menyelenggara jalan dan rezab jalan milik Pihak Ketiga.

A 3. Mahkamah berpendapat bahawa Defendan Kedua bukan sahaja bertanggungjawab dalam penyelenggaraan jalan raya sahaja tetapi termasuk juga bertanggungjawab untuk "clearance of vegetation" seperti yang dinyatakan dalam "Appendix 1" dalam eksibit D21 iaitu perjanjian antara Defendan Kedua dengan Pihak Ketiga.

B 3.1 Mahkamah berpendapat bahawa maksud "vegetation" adalah termasuk semua jenis tanaman pokok dan oleh itu Defendan Kedua adalah bertanggungjawab untuk menyelenggara dalam kawasan tanaman pokok-pokok tersebut.

…

C 3.4 Oleh kerana eksibit D21 tidak menyatakan definisi "vegetation", Mahkamah bersetuju dengan hujahan Defendan Pertama iaitu terma "vegetation" harus didefinisikan mengikut prinsip tafsiran "*contra proferentum* rules".

D 3.4.1 Mahkamah bersetuju dengan prinsip tafsiran tersebut iaitu jika wujudnya sesuatu kekeliruan di dalam suatu kontrak atau dokumen, maka tafsiran mesti menentang pihak yang mengemukakan kontrak atau dokumen tersebut.

3.4.2 Mahkamah telah merujuk kepada kes Privy Council, *Kandasamy v. Mohamed Mustafa* [1983] CLJ Rep 7

E …

…

3.5.1 Mahkamah telah merujuk kepada Enakmen Taman-Taman 1984 (Sabah) dan Enakmen Perlindungan Alam Sekitar 2001 (Sabah) yang telah memberikan definisi F "vegetation" sebagai pokok.

…

G 4.1 Mahkamah berpendapat Defendan Kedua yang mempunyai akses untuk masuk ke kawasan Pihak Ketiga bagi menjalankan kerja-kerja menyelenggara dan mempunyai peluang untuk meneliti keadaan pokok-pokok termasuklah pokok subjek tersebut.

…

H. KESIMPULAN

H 1. Mahkamah berpendapat bahawa Defendan Kedua adalah berliabiliti 100% dalam tindakan kes ini adalah tepat.

**The Court's Finding**

**[36]** It is trite law based on a number of great authorities, an appellate court I should but rarely interfere with the conclusion arrived at by the trial judge who has had the advantage of hearing the witnesses unless it is satisfied that the trial judge has acted on a wrong principle of law or has made a wholly erroneous estimate of damage suffered, either due to an omission to consider

relevant materials or admitting irrelevant consideration. The cases in reference are *Tan Kuan Yau v. Suhindrimani Angasamy* [1985] 1 CLJ 429; [1985] CLJ (Rep) 323, *Kyros International Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2013] 3 CLJ 813 and the case of *Kerajaan Malaysia v. Global Upline Sdn Bhd & Another Appeal* [2016] 1 LNS 1158; [2017] 1 MLJ 187.

**[37]** In any event, this court is of the view that it has the duty to interfere with the findings of facts to prevent a miscarriage of justice upon review of the facts, the law and evidence even where the Sessions Judge had the advantage of hearing the witnesses. This court agreed with the view of the second defendant's counsel and the authority attributed, *Tan Sri Khoo Teck Puat & Anor v. Planitude Holdings Sdn Bhd* [1993] 2 CLJ 146; [1993] 1 MLJ 113 Supreme Court, that this court may amend or disturb the decision made by the trial judge after a full hearing based on the grounds that the trial judge were plainly wrong in law or reached an unsatisfactory decision.

**[38]** This suit was brought by the plaintiff. The burden to prove, on the balance of probability, rests on the plaintiff. The plaintiff is to discharge its onus to prove its cause of action against the defendants as decided by the Federal Court in the case of *Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd* [2017] 5 CLJ 418. Based on *Letchumanan Chettiar's (supra)* case, s. 101 of the Evidence Act 1950 was referred holding that the burden to establish the case rests throughout on the party who asserts the affirmative of the issue.

**[39]** This court holds the view that the burden of proof rests with the plaintiff and the onus to prove shifts between the plaintiff and the first defendant and then to the second defendant, where the onus shifts between parties and to the party who asserts, to produce the evidence to rebut the plaintiff's evidence.

**[40]** One of the Sessions Judge's findings is that the second defendant is liable simply by denoting that JKR is liable. However, no judgment was passed on the third party. No judgment was made on the first defendant which could also mean that there was no decision binding against the third party.

**[41]** Where a third party is brought by a defendant based on O. 16 of Rules of Court 2012 (ROC 2012), a third party proceeding is a separate proceeding from the main action which is strictly between the defendant and the third party: O. 16 r. 1(1) ROC 2012. Third party proceedings is basically to make the third party bound by the decision reached in the main action between the plaintiff and the defendant, in this case it would be between the plaintiff and the first defendant and the second defendant to which the Sessions Judge could have addressed the matter.

**[42]** The plaintiff first brought the suit against the first defendant and then against the second defendant. The second defendant's several grounds of appeal are pertaining to the responsibility of the first defendant and the nexus between the second defendant and the third party based on the contract.

**[43]** This court holds the view that it would be incumbent for this court to intervene where the Sessions Judge had so fundamentally misdirected herself by not correctly identifying the legal issues. I viewed that the crux of the matter is pertaining to the road reserve bordering the road as that was where the fallen tree branch occurred and the body responsible for the said road reserve.

**[44]** The plaintiff also pleaded that the first defendant and second defendant contributed negligently to the cause of the accident. In a case where negligence is pleaded, I am to be reminded that the onus is not on the defendant to prove that he was not negligent as decided in the case of *Ng Chul Sia v. Maimon bt. Ali* [1982] 1 LNS 95; [1983] 1 MLJ 110.

**[45]** Reverting to the facts, it was not disputed that the accident was caused by the fallen tree branch from one of the trees on the road reserve bordering the road which hit the plaintiff causing injury. The plaintiff adduced evidence rebutting the defence of the first defendant that the cause of the accident was an Act of God.

**[46]** It was the plaintiff's pleaded case that the first defendant has the ownership of Jalan Bukit Idaman, Selayang (paras. 2 and 4 of the amended statement of claim, p. 17of appeal record) and the control to upkeep the trees is the second defendant's responsibility based on its scope of works for road maintenance and/or trees at the road shoulders (paras. 3-4, amended statement of claim, p. 17):

> 2. Pada masa yang material, Defendan Pertama adalah Pemilik harta di Jalan Bukit Idaman, Selayang termasuk pokok-pokok di sepanjang jalan tersebut dan bertanggungjawab untuk menjaga dan memelihara pokok-pokok tersebut.
>
> 3. Pada masa yang material, Defendan Kedua adalah pihak yang diberi tanggungjawab dalam skop penyelenggaraan jalan dan/atau pokok di bahu jalan di Jalan Simpang 3, Jalan Bukit Idaman/Jalan 6 Bukit Idaman, Selangor Darul Ehsan.
>
> 4. Pada masa yang material Defendan Pertama dan/atau Defendan Kedua adalah dalam penguasaan atau bertanggungjawab untuk penyelenggaraan pokok-pokok di sepanjang Jalan Bukit Idaman, Selayang, Selangor Darul Ehsan.

**[47]** It was the averment of the first defendant that the third party is the owner of the road reserve bordering the said road and as the road maintenance works had been contracted to the second defendant, the responsibility is placed on the second defendant.

**The State Road And The Road Reserve**

**[48]** This court sought clarification from counsel as to the status of the road where the accident occurred and counsel for the first defendant submitted that it is a State road, named as Jalan Bidara and the trees planted were on the reserve land bordering the State road. It was brought to this court's attention that the status of the said road was not raised nor queried by the Sessions Judge.

**[49]** In this instant case, the status of the road is pertinent where it involves one or more authorities responsible on the road issue at hand. The crux of the matter is which body is responsible for maintaining that road including the road reserve bordering the said road. Land had been categorised as a State matter which is provided in the Federal Constitution (under List II – State list, Ninth Schedule, Federal Constitution) and where roads are built on State land or land alienated for roads to be built for Federal purpose are governed by the Federal Constitution, the National Land Code (NLC), the Land Acquisition Act and the Road Transport Act 1987 (Act 333) (RTA 1987), to name a few.

**[50]** Under s. 2 of the RTA 1987, 'road' means:

> (a) any public road and any other road to which the public has access and includes bridges, tunnels, lay-bys, ferry facilities, interchanges, roundabouts, traffic islands, road dividers, all traffic lanes, acceleration lanes, deceleration lanes, side-tables, median strips, overpasses, underpasses, approaches, entrance and exit ramps, toll plazas, service areas, and other structures and fixtures to fully effect its use;
>
> (b) for the purposes of sections 70 and 85, also includes a road under construction; and
>
> (c) for the purpose of sections 41,42, 43, 44, 45 and 45A, also includes a parking place;
>
> A 'Federal road' is defined under RTA 1987 to mean "a designated Federal Territory road and a road declared to be Federal under Federal law."
>
> A road declared to be Federal is governed by the Federal Roads Act 1959 (Act 376).

**[51]** In relation to road reserve, this can be found under art. 83(1) of Federal Constitution which provides that if the Federal Government requires land in the State which has not been alienated for Federal purposes, the Federal Government may after consultation with the State Government and the State Government shall cause the land to be made to the Federal Government or direct the grant of the land to the public authority so directed by the Federal Government. Article 83(7) of the Federal Constitution provides for reservation of land in the State for Federal purposes on such terms and conditions as may be agreed between the Federal Government and the State Government, or the appropriate authority in a State may acquire land for Federal purposes.

**[52]** A State land is defined under s. 5 of the NLC to mean all lands in the State other than alienated land, reserved land, mining land and any land which, under the provisions of any law relating to forests, is for the time being reserved forest. A 'reserve land' is defined under s. 5 of the NLC as follows:

A "reserved land" means land for the time being reserved for a public purpose in accordance with the provisions of section 62 or any previous land law;

This would mean reserve land is for public purpose and does not include a private place.

B **[53]** The power of reservation of State land is expressly stated with the State Authority following s. 62(1) of the NLC, as stated in the reserved land definition. The enabling provision of s. 62(1) empowers the State Authority to reserve any State land for any public purpose and the State Authority by notification in the *Gazette* reserve any State land for any public purpose.

C **[54]** It was the contention of the first defendant that the road reserve bordering the State road where the accident occurred belonged to JKR/third party, asserting that it is a private land. If the argument is as such, the question would be whether the land where the State road is built, would be under the purview of the Federal Land Commissioner? No argument was D submitted in that order and throughout the proceedings before the trial judge, it was not disputed that the accident occurred on a State road where the tree branch fell from the road reserve bordering the State road.

**[55]** The question arise is whether the said road reserve or land reserve E bordering the State road is gazetted as Federal, which means whether it is reserved under the law. According to s. 40(a) of NLC, the entire property in all State land vested solely in the State Authority. Based on s. 42(b) of NLC, the State Authority shall have the power to reserve State land. Following s. 62(1) of NLC, the State Authority has the power to reserve any State land for any public purpose and by notification in the Gazette reserve F any State land. I therefore do not think that the road reserve bordering the State road is a private land and owned by JKR as argued by the first defendant's counsel. As the said road reserve was not gazetted, it could not be categorised as a reserve land.

G **[56]** The issue of road reserve and the gazette requirement can be referred to in the case of *Ganad Media Sdn Bhd v. Metrawiac Corporation Sdn Bhd & Anor; Pentadbir Tanah Daerah Petaling (Third Party)* [2010] 1 LNS 1254 and the case of *Hotel Sentral (JB) Sdn Bhd v. Pengarah Tanah Dan Galian Negeri Johor, Malaysia & Ors* [2016] 3 CLJ 931. In *Ganad Media's (supra)* case, briefly, it was regarding plaintiff's application to construct a two sided unipole H advertising billboard on the land believing to be a State land but was stopped by the first defendant, the concessionaire of the said land following one Concession Agreement for the construction of a highway, entered between Datuk Bandar Kuala Lumpur and the first defendant. The first defendant contended that the said land is within the concession area and the said land I is a Federal road. The second defendant contended that *via* an advertising agreement with the first defendant, it is the rightful licensee of the first defendant to construct the second defendant's unipole on the said land. The High Court Judge found that the said land is a State land as it was not gazetted as a Federal reserve land.

**[57]** In *Hotel Sentral (JB)*'s *(supra)* case, the applicant sought to revoke the road reserve status. In that case, although it is a judicial review matter involving public authority's decision making, the learned Judicial Commissioner (now a High Court Judge) deliberated on the issue as to whether it was indeed a road reserve. The road reserve was situated between two plots of land where on one plot is the hotel bought by the applicant and the road built on the road reserve are utilised by the public as well as by the hotel. It was argued by the first respondent and second respondent (Pengarah Tanah dan Galian and Pendaftar Hakmilik) that the said land was never gazetted as a reserved land under the NLC and therefore no revocation of any reserved land would be necessary. The learned Judicial Commissioner decided that in the absence of any Gazette, the said land is still a State land.

**[58]** According to s. 62(1) of NLC, the road reserve requires to be gazetted. No proof was adduced by the first defendant who asserted that it is a road reserve and claimed as a private place, owned by JKR. The fact remains that the road reserve belongs to the State Authority which is the Selangor State Government and therefore the road reserve is a State land.

**The Long Term Contract**

**[59]** Upon careful perusal of the contract submitted by the first and second defendants, it is between the State Government of Selangor and the second defendant (pp. 375 appeal record lampiran 4). It was signed on behalf of the State Government Selangor by the State Financial Officer and a member of Selangor State Government EXCO. Perusing the contract, the road maintenance works as defined is as listed in the Schedules to the contract. Cutting of trees is categorised as emergency works defined under Appendix III of Contract as submitted by the first defendant but the complete copy was not scrutinised at the Sessions Court. It was brought to this court's attention, submitted by the first defendant's counsel, that there was a request for a full copy of the contract but was sent to the Sessions Court after the trial. This court viewed that the party who submits relying on the contract could not compile the complete set of the contract to assist this court. I am left with no choice but to rely on the contract as submitted before this court.

**[60]** Under the contract, 'Routine Maintenance Works' had been defined as:

> means the works carried or to be carried out by the Company in relation to the Contract, within the State of Selangor, as more particularly described in Appendix I;
>
> Straight to the second main ground, it was the 1st Defendant's averment that the road maintenance works are to be carried out by the 2nd Defendant which includes clearing the vegetation. In reference to the Parks Enactment 1984 as submitted by the 1st Defendant's counsel, 'vegetation' includes "Forest" and includes 'trees'. This Court had the benefit of reading through the Contract including the appendices where

A at page 425, maintenance of road shoulders is listed as Company's (2nd Defendant) description of works where under item 1 states "Re-grading and clearance of vegetation." Grass cutting is also included at the road shoulder and Median (page 426 of the Appeal Record Lampiran 4).

**[61]** Based on the second defendant's description of works stipulated in the B contract, this court cannot help but query the clearance of vegetation at the road shoulder and the same as listed as 'the removal of vegetation on the bridges and culvert' (p. 428 of appeal record lampiran 4). Both description of works refer to 'vegetation' and it would be absurd to think that the vegetation include trees are planted on bridges if the same definition is to be C applied for bridges.

**[62]** I viewed that the word 'trees' are not used in the contract but rather 'vegetation' to differentiate the maintenance works involving vegetation and trees under the contract. Simply put, if the second defendant is tasked to clear the trees along the State road, it would have been clearly provided in the D contract. Thus far, no trees had been removed by the second defendant except when there's a fallen tree on the road requiring the second defendant to remove as instructed by JKR. Based on the testimony of the first defendant's witness, SD2, a landscape architect for the first defendant, the fallen tree six days prior to the accident was carried out by the first defendant E based on a public complaint (p. 119 of appeal record). During the cross-examination by the third party's counsel, SD2 testified (pp. 123-124 of appeal record lampiran 3) that:

Q: MPS selenggara di jalan median sahaja tetapi pada masa yang sama memantau sekeliling.

F A: Ya.

Q: Rujuk mukasurat 8, Ikatan E. Selepas MPS memotong pokok tersebut, ada maklumkan kepada JKR mengenai pemotongan tersebut?

A: Tiada.

G

Q: Pihak MPS mengambil tindakan sendiri dan bertanggungjawab terhadap pemotongan tersebut.

A: Ya, berdasarkan Akta.

Q: Berdasarkan keputusan tersebut, pihak MPS bertanggungan untuk H menyelenggara.

A: Tidak setuju.

Q: Rujuk mukasurat 10-31, Ikatan E. Ini adalah jadual penyelenggaraan Lanskap MPS.

I A: Betul.

Q: Ada syarikat dilantik bagi penyelenggaraan ini.

A: Betul.

Q: Kontrak ialah antara MPS dan syarikat Fitrah Jati. A

A: Ya.

Q: Ada kontrak di Mahkamah?

A: Tiada. Mukasurat 10 telah cukup.

Q: Pihak MPS atau syarikat Fitrah Jati yang bertanggungjawab menyelenggara. B

A: Tidak setuju.

Q: Pihak MPS bertanggungjawab memastikan lanskap di sepanjang jalan adalah mengikut piawaian. C

A: Ya.

**[63]** Based on the oral evidence, the first defendant admitted that the maintenance of the landscape which includes the trees along the State road fall under the purview of the first defendant which is statutorily provided in the LGA. The maintenance works carried out by another party contracted D by the first defendant was not disputed by the first defendant. Upon highlighting the marked maintenance area of the State road, SD2 admitted that the first defendant or the company contracted for the work, Fitrah Jati is responsible to carry out the maintenance work (p. 126 of appeal record lampiran 3): E

Q: Penandaan penyelenggaraan ditandakan dengan warna Hitam.

A: Ya.

Q: Di kawasan Bukit Idaman 6 menunjukkan 2 garisan.

A: Setuju. F

However when SD2 was challenged by raising the issue that the subjected tree is at the road shoulders and it would then be under the responsibility of the first defendant or Fitrah Jati, SD2 disagreed.

**[64]** In relation to the rule '*contra proferentum*' as submitted by the first G defendant, this court viewed that it will not be applicable as the word 'trees' is not expressly stated in the contract and there is no clause in the contract which has two or more meanings regarding the word 'vegetation': *Kong Ming Bank Berhad v. Leong Ho Yuen* [1982] 1 LNS 23.

**[65]** I am hard pressed to find that the responsibility on the road reserve H is the local authority established under the LGA 1976 that is the first defendant. This is further corroborated based on the letter by JKR to all States for Federal roads where maintenance works are carried out as projects between States and local authorities must be in accordance to what JKR has meted out (pp. 308-310 of appeal record lampiran 4). In this case, it involves I a State road where JKR does not have the jurisdiction to interfere. The responsibility on the State roads is as provided in the LGA 1976.

**[66]** The duty of care to maintain trees by or along the State road is to be borne by the local authority as provided under s. 101 of Local Government Act 1976. The Federal Court case, *Ahmad Jaafar Abdul Latiff v. Dato' Bandar Kuala Lumpur* [2014] 9 CLJ 861 clearly spelt out the duty of care which extended to private roads located alongside public roads. The Federal Court in *Ahmad Jaafar Abdul Latif (supra)* decided on one of the points of law, that is to what extent do the powers conferred under s. 101(b) and (cc) of LGA 1976 confers a duty of care on the local authority.

**[67]** In the case of *Ahmad Jaafar Abdul Latif (supra)* the Kuala Lumpur City Hall (DBKL) who is the defendant, concluded in its report that the fallen tree could have been on either two plots of private lands. It was highlighted that the DBKL only came up with the report after three years had lapsed since the date of the incident. DBKL is a local authority according to Local Government Act 1976 where in the case of a Federal Territory, for the City of Kuala Lumpur, is appointed under s. 4 of Federal Capital Act 1960 (Act 190).

**[68]** The LGA 1976 applies only to Peninsular Malaysia which provides for the functions and powers of the local authorities as stipulated under s. 63 and s. 101. Section 101(b) and (cc) LGA states that:

> In addition to any other powers conferred upon it by this Act or by any other written law a local authority shall have power to do all or any of the following things, namely:
>
> (b) **to plant, trim or remove trees**;
>
> …
>
> (v) to do **all things necessary** for or conducive to the **public safety**, health and convenience;
>
> …
>
> (cc) **to require the owner or occupier of any premises** to do any of the following acts:
>
> (i) **to remove, lower or trim to the satisfaction of the local authority any tree**, shrub or hedge overhanging or interfering in any way with the traffic on any road or street or with any wires or works of the local authority or which in the opinion of the local authority is **likely to endanger the public safety** or convenience and in the event of any tree situated in private premises falling across any public road or street the local authority may remove the fallen tree and the expenses incurred shall be charged on and recoverable from the owner or occupier thereof; (emphasis added)

**[69]** The liability of public authority or local authority has long been debated in common law courts. Initially, there was a long standing view that public authorities owe no private duty to individuals capable of founding a civil action, unless such duty can be found in the terms of the authority's enabling statute.

**[70]** However the decision in *Anns v. Merton London Borough Council* [1978] AC 728 at p. 754 departed from this long standing view when it recognised the imposition of a general private duty on such local authorities. In *Ahmad Jaafar Abdul Latif (supra)* case, it was unclear as to the position of the fallen tree which was from the slope along the road. The Right Honourable Federal Court Judge, Tan Sri Raus (now the Chief Justice of Malaysia) articulated that regardless the tree was located on a private land, the Local Government Act 1976 expressly provided that the local authority DBKL, the defendant in that case, to require the owner of occupier of any premises to remove or trim the tree. In addition, it was pointed out that the Local Government Act 1976 does not prohibit the defendant from entering any private land to cut or trim the trees that pose a danger to the public and the defendant should have constantly supervised and trimmed all hazardous trees.

**[71]** Claiming that the responsibility as not theirs do not hold water as the duty are clearly stated in the LGA 1976, a statutory duty that overrides any contractual duty. The Right Honourable Federal Court Judge Tan Sri Raus (now the Chief Justice of Malaysia) had the occasion to say (at para. 22, p. 875):

> ... Unfortunately the defendant did not do so premised in the misconceived notion that it was not their business. I find that s. 101 of the Act is worded in imperative terms, leaving no room for any discretion for the local authority in the exercise of its duty. The defendant was statutorily empowered to take the appropriate action when any breach is "likely to endanger the public safety" namely to trim the tree or to require the owner or occupier of any premises to remove, lower or trim any tree. The words so employed in s. 101 (cc)(i) of the Act ie, "likely to endanger" gives rise to the probability of the occurrence of such incident that triggers the safety standard required by the local authority to take action before harm is caused.

**[72]** In the absence of a gazette as a road reserve for Federal, the trees planted on the road reserve or shoulders bordering the State road is under the first defendant's jurisdiction and control. Following s. 101(b) and (cc) LGA 1976, there is a clear abdication of duty on the part of the first defendant. This court finds that the evidence adduced by the first defendant based on its own witnesses whom testified that the first defendant designated officers carry out routine inspections (SD3's witness statement and SD2's oral evidence during cross-examination, p. 111 of appeal record lampiran 3) and found that no inspection was carried out at the site prior to the accident by the first defendant.

**[73]** Upon reading s. 101 of Local Government Act 1976, it clearly imposes the duty on the first defendant to remove or trim any tree, shrub or hedge which in its opinion is likely to endanger public safety or convenience. The keyword is, 'likely to endanger' which means that before the tree becomes a danger to the public, the local authority should prevent any unwanted catastrophe.

**[74]** In addition, s. 101(b) LGA refers to trees as one of the duties of the local authorities. Any act done or omission by the first defendant would give direct repercussion on the plaintiff. The first defendant is statutorily bound to ensure that the safety of the plaintiff and any road user of Jalan Bidara is not compromised by any tree on or along the State road. This court is of the view that the subjected tree will not go unnoticed if regular inspection and patrol are carried out by the first defendant.

In light of the above reasons, I find that the first defendant is wholly liable. Reversing the Sessions Judge's decision, I allow the appeal with cost.